

**BEFORE**

**THE PUBLIC SERVICE COMMISSION OF**

**SOUTH CAROLINA**

**DOCKET NO. 2017-354-C - ORDER NO. 2018-\_\_\_\_\_**

IN RE: Complaint and Petition for Declaratory Order	)	<b>SOUTH CAROLINA OFFICE OF</b>
of Pay Tel Communications, Incorporated,	)	<b>REGULATORY STAFF</b>
Complainant/Petitioner v. Lattice	)	<b>PROPOSED ORDER</b>
Incorporated, Defendant/Respondent	)	

**I. INTRODUCTION**

This matter comes before the Public Service Commission of South Carolina ("PSC" or the "Commission") by way of the Complaint and Petition for Declaratory Order of Pay Tel Communications, Incorporated ("Pay Tel"), dated November 30, 2017 (the "Complaint"). By its Complaint, Pay Tel sought an order from this Commission declaring: 1) Lattice, Incorporated ("Lattice") is a telephone utility as defined in S.C. Code Ann. § 58-9-10 and Lattice is providing inmate telephone services in South Carolina; 2) Lattice is required to obtain a certificate of public convenience and necessity ("CPCN") from this Commission and pursuant to S.C. Code Ann. § 58-9-280(A) prior to offering or providing inmate telephone service in South Carolina, but has obtained no such certificate; 3) Lattice is required to file a tariff schedule that is approved by the Commission before charging any rate associated with inmate telephone services, pursuant to S.C. Code Ann. § 58-9-230(A) and S.C. Code Ann. Regs. 103-603(B), but has filed no such schedule with the Commission or obtained any necessary approval; 4) Lattice is a "public utility" subject to assessment pursuant to S.C. Code Ann. § 58-3-100; and 5) Lattice is a "telecommunications company" providing "telecommunications services in South Carolina" and therefore required to

contribute to the South Carolina Universal Service Fund (“USF”) pursuant to S.C. Code Ann. § 58-9-280(E)(2).

#### **A. Notice and Intervention**

By letter dated December 11, 2017, the Clerk’s Office of the Commission instructed Lattice, as the Defendant/Respondent, to answer the allegations contained in the Complaint and to serve a copy of the answer upon the Commission, Pay Tel and the Office of Regulatory Staff (“ORS”) within thirty (30) days receipt of the Complaint. By letter dated December 11, 2017, the Clerk’s Office of the Commission provided notice of the hearing and the prefile testimony deadlines.<sup>1</sup> ORS participated in this hearing pursuant to S.C. Code Ann. § 58-4-10(B), no other parties intervened.

#### **II. STATUTORY STANDARDS AND REQUIRED FINDINGS**

Any party may file a written complaint with the Commission requesting a hearing when complaining of anything done or omitted to be done by any person under the statutory jurisdiction of the Commission in contravention of any statute, rule, regulation or order administered or issued by the Commission, per S.C. Code Ann. Regs. 103-824. A petition for a declaratory order may be filed with the Commission pursuant to S.C. Code Ann. Regs. 103-825. The Commission is authorized and directed by S.C. Code Ann. § 58-8-1120 to conduct hearings on complaints and petitions regarding telecommunications services, and to render rulings as it sees fit pursuant to S.C. Code Ann. § 58-9-820. S.C. Code Ann. § 58-9-1150 provides that at a hearing before the Commission the complainant, ORS, and telephone utility complained of shall be entitled to be

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<sup>1</sup> The original dates were later amended upon consent of all parties in order to accommodate Lattice’s request for extension filed on January 17, 2018 and Lattice’s request for a change to the procedural scheduled filed on January 23, 2018.

heard and to introduce evidence.

### **III. HEARING**

The Commission convened a hearing on this matter on May 1, 2018, with the Honorable Swain E. Whitfield presiding. Pay Tel was represented by John J. Pringle, Jr., Esquire; Lattice was represented by Frank R. Ellerbe, III, Esquire; and ORS was represented by Jenny Pittman.

At the outset of the hearing, counsel for Lattice briefed the Commission on the current status of Lattice's affairs in South Carolina. Mr. Ellerbe acknowledged that Lattice had been operating without permission due to a misunderstanding of the laws pertaining to inmate service providers. Mr. Ellerbe informed the Commission that Lattice was no longer providing inmate services to the detention facilities in Colleton and Union Counties, and that Lattice intended to file for a CPCN within the next ninety (90) days.

Through their personal appearances, Pay Tel presented the direct testimonies and exhibits of John V. Townsend<sup>2</sup>; ORS presented the direct testimony of Christopher J. Rozycki; and Lattice presented the direct testimony of Terry Whiteside.

In response to the direct testimony of Lattice Witness Whiteside, Pay Tel presented the rebuttal testimony of Witness Townsend and ORS presented the surrebuttal testimony of Witness Rozycki.

Pay Tel Witness Townsend testified that Pay Tel was the first company to obtain a CPCN as an inmate service provider in 1991, and that today Pay Tel serves twelve (12) facilities across the state. Witness Townsend testified that he thought Lattice would have filed to come into

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<sup>2</sup> The two exhibits attached to Witness Townsend's Direct Testimony were entered into the record as the Composite Hearing Exhibit 1.

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compliance as an inmate service provider by the time of the hearing, but that he was otherwise pleased with the update provided by Lattice's counsel. Witness Townsend stated that Pay Tel wants to operate in a fair and competitive environment, which is why Pay Tel filed this action against Lattice. Witness Townsend testified that he considered all of Pay Tel's services to be regulated as they are all tied to inmate telecommunication services. Witness Townsend testified that he considered video visitation and Skype messaging to be regulated services.

Lattice Witness Whiteside testified that Lattice filed for a CPCN in recent years, but later withdrew its application. Witness Whiteside testified that Lattice initially intended to contract with a third-party vendor to provide services to Colleton and Union Counties, but was unable to do so, which is how Lattice came about providing unauthorized service. Witness Whiteside admitted that Lattice was in the wrong to be providing inmate telecommunication services without permission from this Commission. Witness Whiteside testified that as of April 27, 2018 Lattice no longer provided any services to the detention facilities in Colleton and Union Counties and provided the Commission with a contract<sup>3</sup> between Lattice and WiMacTel, Incorporated<sup>4</sup> for each facility<sup>5</sup>. Witness Whiteside testified that going forward Lattice would be separating into two entities, one providing service and the other providing equipment. Witness Whiteside testified that the company providing inmate services would apply for authorization with this Commission within the next ninety (90) days.

ORS Witness Rozycki testified that Commission Order No. 1991-122 requires inmate

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<sup>3</sup> See Composite Hearing Exhibit 2

<sup>4</sup> WiMacTel, Inc. is authorized to operation in SC per Order No. 2010-714.

<sup>5</sup> The original contract between Lattice and the Colleton County Detention Center and the original contract between Lattice and the Union County Sheriff's Office were late filed exhibits and entered into the record as Composite Hearing Exhibit 3.

service providers to obtain a CPCN prior to providing services to inmate facilities in South Carolina. Witness Rozycki testified that all services related to inmate telecommunications appear to fall under the category of regulated services, not nonregulated services. Witness Rozycki testified that such a determination over regulated versus nonregulated must be made by this Commission, and not the utility itself. Through his direct and surrebuttal testimony Witness Rozycki made several recommendations:

1. That the Commission require Lattice to resubmit its CPCN application within thirty 30 days<sup>6</sup>;
2. That the Commission require Lattice to file a bond pursuant to S.C. Code Ann. Regs. 103-607 if Lattice obtains a CPCN;
3. If Lattice fails to obtain a CPCN, that the Commission issue a cease-and-desist order<sup>7</sup>;
4. That the Commission rule that all services provided by an inmate service provider be designated as regulated telecommunications service, until a provider requests and the Commission determines otherwise<sup>8</sup>;
5. That the Commission should notify the inmate facilities where Lattice is under contract and providing service that Lattice is in violation of South Carolina law and operating a telephone utility without proper authority from the PSC;
6. That the Commission may wish to notify, or request that ORS notify, all South Carolina inmate confinement facilities, the South Carolina Sheriff's Association, and

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<sup>6</sup> Mr. Rozycki stated that the ninety (90) days Witness Whiteside suggested is acceptable as well.

<sup>7</sup> This recommendation was mooted by Hearing Exhibit 2, which shows that Lattice no longer provides services in Colleton and Union Counties.

<sup>8</sup> Witness Whiteside testified that there are differences between regulated and nonregulated services, however Witness Whiteside also testified that video messaging is unregulated. Such a determination is not for a utility to make on its own, but one that must be decided by this Commission.

the South Carolina Jail Administrators that inmate service providers in South Carolina are telephone utilities under South Carolina law and must possess a CPCN to operate in the state; and

7. ORS will post a list of all inmate service providers authorized or certificated to operate in South Carolina<sup>9</sup>.

#### **IV. FINDINGS AND CONCLUSIONS**

1. The Public Service Commission of South Carolina is authorized and directed by S.C. Code Ann. § 58-8-1120 to conduct hearings on complaints and petitions regarding telecommunications services, and to render rulings as it sees fit pursuant to S.C. Code Ann. § 58-9-820.

2. Pay Tel is a corporation incorporated under the laws of the State of North Carolina. Pay Tel is authorized to transact business in the State of South Carolina.

3. Pay Tel is a “telephone utility” as defined by S.C. Code Ann. § 58-9-10 and currently provides inmate telephone services to confinement facilities in South Carolina pursuant to the provisions of Chapter 9 of Title 58 of the South Carolina Code of Laws.

4. Pay Tel was certified to provide inmate telephone service in South Carolina on March 4, 1991 by Commission Order 1991-122 in Docket No. 1990-305-C. Pay Tel has continuously served South Carolina confinement facilities since that date.

5. Pay Tel charges rates approved by this Commission that are set out in a tariff that has been filed with the Commission and with ORS, contributes to the South Carolina Universal Service Fund (“USF”) as required by the Commission and in the amounts determined by ORS,

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<sup>9</sup> On May 23, 2018 ORS posted on its website a list of all inmate service providers authorized to operate in SC.

and pays annual gross receipts assessments based upon its gross revenue from operation in South Carolina.

6. Lattice is a corporation incorporated under the laws of the State of Delaware and has been authorized to transact business by the Secretary of State in the State of South Carolina, but Lattice has not been authorized by this Commission or received a certificate from ORS to offer telephone services in this State.

7. Lattice is a “telephone utility” as defined by S.C. Code Ann. § 58-9-10, however Lattice is not currently authorized to provide telecommunications services in the State of South Carolina. Lattice applied for a CPCN on December 9, 2015, but later withdrew its application on February 11, 2016.

8. Lattice provided inmate telephone services to two inmate facilities – one in Colleton County and one in Union County. As of April 27, 2018, Lattice was no longer the inmate service provider at those facilities.

9. Lattice has been operating as a “public utility” subject to assessment pursuant to S.C. Code Ann. § 58-3-100.

10. Lattice has been operating as a “telecommunications company” providing “telecommunications services in South Carolina” and therefore is required to contribute to the South Carolina Universal Service Fund (“USF”) pursuant to S.C. Code Ann. § 58-9-280(E)(2).

**IT IS THEREFORE ORDERED THAT:**

1. Lattice shall file with this Commission an application for a Certificate of Public Convenience and Necessity, and obtain said Certificate, before offering services as an inmate service provider in this State.

2. Should Lattice file an application for a Certificate of Public Convenience and Necessity, Lattice may meet the financial fitness tests through the filing of a bond as set out by S.C. Code. Ann. Regs. 103-607.

3. Pursuant to S.C. Code Ann. § 58-9-230(A) and S.C. Code Ann. Regs. 103-603(B), should Lattice offer services as an inmate service provider in this State, Lattice shall file a tariff schedule that is approved by this Commission before charging any rate associated with inmate telephone services.

4. All voice-based telephone services including Voice over Internet Protocol (VoIP) services provided by an inmate service provider are designated as regulated telecommunications services, unless this Commission should issue an order stating otherwise.

5. The South Carolina Office of Regulatory Staff shall notify all South Carolina inmate confinement facilities, the South Carolina Sheriff's Association, and the South Carolina Jail Administrators that inmate service providers in South Carolina are telephone utilities under South Carolina law and must possess a Certificate of Public Convenience and Necessity to operate in this State.

6. ORS will maintain the list of all certificated inmate service providers authorized to operate in this State on its website.

BY ORDER OF THE COMMISSION:

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Swain E. Whitfield, Chairman

ATTEST:

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Comer H. Randall, Vice Chairman

June \_\_, 2018